

# UNDER THE GUN: WILL STATES' ONE-GUN-PER-MONTH LAWS PASS CONSTITUTIONAL MUSTER AFTER *HELLER* AND *MCDONALD*?

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<b>I. INTRODUCTION.....</b>	<b>164</b>
<b>II. HISTORY OF SECOND AMENDMENT JURISPRUDENCE PRIOR TO     <i>HELLER</i> AND <i>MCDONALD</i>: AN INDIVIDUAL OR COLLECTIVE     RIGHT? .....</b>	<b>166</b>
<b>III. <i>HELLER</i> AND <i>MCDONALD</i> ESTABLISH AN INDIVIDUAL RIGHT TO     KEEP AND BEAR ARMS IN THE HOME FOR SELF-DEFENSE.....</b>	<b>170</b>
<b>IV. JUDICIAL REVIEW OF GUN CONTROL LEGISLATION POST-     <i>HELLER</i> AND <i>MCDONALD</i>.....</b>	<b>174</b>
A. <i>Gun Control Legislation in the Heller “Safe Harbor”</i> .....	174
B. <i>Lower Courts Search for the Proper Standard of Review for         Gun Control Legislation.....</i>	176
C. <i>One-Gun-Per-Month Laws Pose a Unique Challenge to         Courts.....</i>	179
<b>V. ANALYSIS .....</b>	<b>181</b>
A. <i>Intermediate Scrutiny is the Proper Standard of Review for         Gun Control Legislation.....</i>	181
B. <i>Applying Intermediate Scrutiny, One-Gun-Per-Month Laws         Pass Constitutional Muster.....</i>	184
<b>VI. CONCLUSION .....</b>	<b>187</b>

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## I. INTRODUCTION

In the early morning hours of December 12, 2011, New York City police officers responded to a reported robbery taking place in a Brooklyn basement.<sup>1</sup> Unbeknownst to the officers, the robbers were still in the basement, hiding in the shadows behind them.<sup>2</sup> The robbers, attempting to evade the officers, tried to slip away unnoticed through a back door.<sup>3</sup> They were met, however, by two other police officers who had just arrived to provide backup support to the officers at the scene.<sup>4</sup> Surprised at the sight of the two additional officers, one of the robbers took out his gun and shot Officer Peter Figoski in the face.<sup>5</sup> Officer Figoski later died in the hospital.<sup>6</sup> The gunman, Lamont Pride, had used an illegally obtained gun that police later traced back to Virginia.<sup>7</sup>

This is not at all uncommon in New York City, where 85 percent of the guns used in crimes come from out-of-state, and 90 percent of those guns are illegal.<sup>8</sup> According to the office of Mayor Michael Bloomberg, Virginia is the number one exporter of guns that are used in commission of crimes in New York City, and one of the top suppliers nationally.<sup>9</sup> Thus, it was distressing to many, including Mayor Bloomberg, when Governor Bob McDonnell of Virginia announced that the state was repealing its one-gun-per-month law in March of 2012.<sup>10</sup> One-gun-per-month laws seek to prevent the export of guns from states with weaker firearms regulations to states with stricter firearms regulations by means of a “straw” purchaser who buys

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<sup>1</sup> Michael Wilson, *In Dark Brooklyn Doorway, Officer Confronts Gunman, and Dies*, N.Y. TIMES, Dec. 13, 2011, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Tina Moore & Bill Hutchinson, *Mayor Bloomberg criticizes Virginia repeal of 20-year-old gun law*, N.Y. DAILY NEWS (Mar. 1, 2012), <http://www.nydailynews.com/new-york/mayor-bloomberg-criticizes-virginia-repeal-20-year-old-gun-law-article-1.1031149>.

<sup>8</sup> Kirsten Gillibrand, *End the Flow of Illegal Guns*, HUFFINGTON POST (Jan. 9, 2013), [http://www.huffingtonpost.com/rep-kirsten-gillibrand/end-the-flow-of-illegal-g\\_b\\_2440791.html](http://www.huffingtonpost.com/rep-kirsten-gillibrand/end-the-flow-of-illegal-g_b_2440791.html).

<sup>9</sup> Moore & Hutchinson, *supra* note 7.

<sup>10</sup> *Id.*

guns in bulk and then resells them on the street.<sup>11</sup> The law does so by limiting the number of guns that an individual may purchase to one every thirty days.<sup>12</sup>

Though Virginia has repealed its one-gun-per-month law, legislatures in Maryland, California, and, most recently, New Jersey have enacted their own versions of one-gun-per-month laws in order to combat the illegal transfer of firearms.<sup>13</sup> Studies indicate that one-gun-per-month laws, where implemented, have been successful in reducing interstate firearms trafficking.<sup>14</sup> Governor McDonnell and other gun rights advocates, however, argue that these laws unconstitutionally burden citizens' Second Amendment right to bear arms, a right that was recently reaffirmed by the Supreme Court in *District of Columbia v. Heller*<sup>15</sup> in 2008 and *McDonald v. City of Chicago* in 2010.<sup>16</sup> As a result of *Heller* and *McDonald*, much of the existing state gun control legislation in the United States has been called into question.<sup>17</sup> Lower courts have upheld a wide variety of gun control laws, such as felon-in-possession bans and bans on carrying weapons in sensitive places, such as national parks, without much difficulty.<sup>18</sup> However, neither *Heller* nor *McDonald* provided guidance to lower courts on how they should evaluate gun control laws, and so the future of gun control legislation remains unclear until the Supreme Court articulates a standard of review for interpreting the Second

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<sup>11</sup> *Multiple Purchase & Sale of Firearms Policy Summary*, LAW CENTER TO PREVENT GUN VIOLENCE, [http://smartgunlaws.org/multiple-purchases-sales-of-firearms-policy-summary/#identifier\\_0\\_5790](http://smartgunlaws.org/multiple-purchases-sales-of-firearms-policy-summary/#identifier_0_5790).

<sup>12</sup> *Id.*

<sup>13</sup> MD. CODE ANN., PUB. SAFETY § 5-128(b) (LexisNexis 2011); CAL. PENAL CODE §§ 26835(f), 27535(a) (West 2012); N.J. STAT. ANN. §§ 2C:58-2, 2C:58-3 (West 2011).

<sup>14</sup> *Multiple Purchase & Sale of Firearms Policy Summary*, *supra* note 11 (noting that during the time Virginia implemented its one-gun-per-month law, the likelihood of recovering a gun bought in that state dropped by 71 percent in New York, 72 percent in Massachusetts, and 66 percent for New Jersey, New York, Rhode Island, and Massachusetts combined).

<sup>15</sup> 554 U.S. 570 (2008).

<sup>16</sup> 130 S. Ct. 3020 (2010).

<sup>17</sup> Adam Winkler, *The New Second Amendment: A Bark Worse Than Its Right*, THE HUFFINGTON POST, Jan. 2, 2009, [http://www.huffingtonpost.com/adam-winkler/the-new-second-amendment\\_b\\_154783.html](http://www.huffingtonpost.com/adam-winkler/the-new-second-amendment_b_154783.html).

<sup>18</sup> See, e.g., *United States v. Miller*, 604 F. Supp. 2d 1162, 1168 (W.D. Tenn. 2009); *United States v. Masciandaro*, 648 F. Supp. 2d 779 (E.D. Va. 2009), *aff'd*, 638 F.3d 458 (4th Cir. 2011).

Amendment.

After a brief examination of the history of Second Amendment jurisprudence in the United States in Part I, Part II of this Note will analyze the Supreme Court decisions in *Heller* and *McDonald*. In Part III, this Note will analyze how lower courts have addressed constitutional claims against gun control laws in the wake of *Heller* and *McDonald* and in the absence of guidance from the Supreme Court on which standard of review to apply. Finally, in Part IV this Note will conclude that intermediate scrutiny is the proper standard under which Second Amendment challenges to gun control laws should be reviewed, and, under this standard, one-gun-per-month laws pass constitutional muster.

## II. HISTORY OF SECOND AMENDMENT JURISPRUDENCE PRIOR TO *HELLER* AND *MCDONALD*: AN INDIVIDUAL OR COLLECTIVE RIGHT?

The recent push for passage of gun control laws as a response to increasing concern over gun-related violence has thrust the disagreement over the interpretation of the Second Amendment to the forefront of national discourse where, today, it is a source of particular contention that can hardly be ignored.<sup>19</sup> However, it was not always the case that scholars and citizens alike debated the scope of the Second Amendment.<sup>20</sup> Indeed, prior to the *Heller* and *McDonald* era, the Second Amendment was a “relatively obscure constitutional provision” that “attracted little judicial or scholarly attention.”<sup>21</sup>

The debate surrounding the Second Amendment has historically focused on whether it protects an individual right to “keep and bear arms,” or whether it merely protects a collective right of state militias to maintain firearms “free from federal interference.”<sup>22</sup> Three basic schools of thought have emerged: (1) the “traditional individual right” model, (2) the “limited individual right” model, and (3) the

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<sup>19</sup> *More Gun Deaths, Less Resolve in Washington*, N.Y. TIMES, Sept. 20, 2013, at A18.

<sup>20</sup> *Silveira v. Lockyer*, 312 F.3d 1052, 1061 (9th Cir. 2002).

<sup>21</sup> *Id.* at 1060.

<sup>22</sup> Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 684 (2007).

“collective right” model.<sup>23</sup> Proponents of the “traditional individual right” model contend that the Second Amendment guarantees individual private citizens a fundamental right to keep and bear arms for any purpose.<sup>24</sup> The second view holds that individuals have a constitutional right to possess firearms when such possession is “reasonably related” to militia service.<sup>25</sup> The third approach asserts that the Second Amendment right to bear arms guarantees only the right of the people to maintain state militias, and it does not confer any right to the individual to keep and maintain firearms.<sup>26</sup> Prior to the decision handed down by the Supreme Court in *Heller*, the dominant view of the Second Amendment, and the one most widely accepted by lower courts, was the “collective right” model, and it was not until recently that this view came under attack by advocates of the individual right theory.<sup>27</sup> There was, however, no Supreme Court-endorsed view of the Second Amendment, and the lower courts were left to themselves to determine the scope of the right to bear arms.<sup>28</sup>

In the nineteenth century, the Supreme Court limited its analysis of the Second Amendment simply to say that it was not applicable to state or local governments.<sup>29</sup> In *United States v. Cruikshank*, the Court dismissed criminal charges brought against two men who allegedly denied their fellow citizens their rights to “bear[] arms for a lawful purpose.”<sup>30</sup> More importantly, the Court announced that the Second Amendment “means no more than it shall not be infringed by Congress, [and] has no other effect than to restrict the power of the national government.”<sup>31</sup> Then, eleven years later in *Presser v. Illinois*, the Supreme Court affirmed its decision in *Cruikshank*, and upheld an Illinois ban against citizen participation in an “unauthorized militia.”<sup>32</sup> Not until 1939 did the Second

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<sup>23</sup> *Silveira*, 312 F.3d at 1060.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1061.

<sup>29</sup> *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

<sup>30</sup> *Id.* at 545, 556-67.

<sup>31</sup> *Id.* at 542.

<sup>32</sup> 116 U.S. 252, 264-65 (1886). The Court also noted that the ban would not have violated the Second Amendment even if it did apply to the states. *Id.*

Amendment receive any extensive treatment by the Supreme Court, and still, it was nothing more than a “cryptic discussion” of the scope of the right to bear arms.<sup>33</sup> In *United States v. Miller*, the Court considered a Second Amendment challenge to the National Firearms Act of 1934, which prohibited the transportation of unregistered short-barreled shotguns over state lines.<sup>34</sup> Because there was no evidence that the short-barreled shotgun was “any part of the ordinary military equipment or that its use could contribute to the common defense,” the Second Amendment did not guarantee the right to possess such a firearm.<sup>35</sup> In so holding, the Supreme Court went on to conclude that the right to bear arms must have “some reasonable relationship to the preservation or efficiency of a well regulated militia,” with the “obvious purpose to assure the continuation and render possible the effectiveness” of the power of Congress to raise a militia.<sup>36</sup> The Second Amendment, the Court said, “must be interpreted and applied with that end in view.”<sup>37</sup> Thus, in the years that followed *Miller*, a majority of lower courts used this decision to uphold various gun control measures based on the “collective right” view of the Second Amendment.<sup>38</sup>

The Supreme Court did not reference the scope of the Second Amendment again until 1980 in *Lewis v. United States*, where it commented, in a footnote dismissing a Second Amendment challenge to the federal felon-in-possession ban, that federal gun control laws such as the one at issue did not “trench upon any

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<sup>33</sup> *Silveira*, 312 F.3d at 1060.

<sup>34</sup> 307 U.S. 174, 175-76 (1939).

<sup>35</sup> *Id.* at 178.

<sup>36</sup> *Id.*; accord U.S. CONST. art. 1, § 8, cl. 15 (“The Congress shall have the Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions . . .”).

<sup>37</sup> *Miller*, 307 U.S. at 178.

<sup>38</sup> See, e.g., *United States v. Haney*, 264 F.3d 1161, 1165 (10th Cir. 2001) (citing *Miller* to support its holding that a “federal criminal gun-control law does not violate the Second Amendment unless it impairs the state’s ability to maintain a well-regulated militia”); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (noting that “*Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia”); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (declaring that “the *Miller* Court . . . demanded a reasonable relationship between [a weapon’s] ‘possession or use’ and militia-related activity” (quoting *Miller*, 307 U.S. at 178)).

constitutionally protected liberties.”<sup>39</sup> It cited to *Miller* to support this view.<sup>40</sup> The Court summarized *Miller*’s holding as not protecting any “right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well-regulated militia.’”<sup>41</sup> Thus, similar to its decision in *Miller*, the Supreme Court in *Lewis* implicitly rejected the traditional individual right model in favor of the collective right view.<sup>42</sup>

It was not until very late in the twentieth century that the collective right view was called into question. A new wave of academic scholarship emerged that supported the individual right view of the Second Amendment, and it began to hold sway in a few lower courts.<sup>43</sup> In 2001, the Fifth Circuit Court of Appeals explicitly adopted the traditional individual right approach, becoming the first Circuit to do so.<sup>44</sup> In *United States v. Emerson*, the Fifth Circuit declared that the Second Amendment protects an individual’s right to keep and bear arms for personal use.<sup>45</sup> It held that “[t]he plain meaning of the right to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service.”<sup>46</sup> Following the lead of the Fifth Circuit, the DC Circuit struck down a gun control law because it violated the Second Amendment, reasoning that the Amendment conferred an individual right to bear arms in *Parker v. District of Columbia* (renamed *District of Columbia v. Heller* upon appeal to the Supreme Court).<sup>47</sup> *Parker* would ultimately provide the impetus to drive the Supreme Court to deal with the Second Amendment directly in *Heller*.

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<sup>39</sup> 445 U.S. 55, 65 n.8 (1980).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (quoting *Miller*, 307 U.S. at 178).

<sup>42</sup> *Silveira*, 312 F.3d at 1061-62.

<sup>43</sup> *Id.*; see also Winkler, *supra* note 22, at 684 (noting that a number of influential legal scholars have criticized the collective right view and endorsed the individual right theory).

<sup>44</sup> *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

<sup>45</sup> *Id.* at 259-60. It should be noted that the court nevertheless upheld the gun control law at issue, which was a ban on possession by domestic violence misdemeanants.

<sup>46</sup> *Id.* at 232.

<sup>47</sup> *Parker v. District of Columbia*, 478 F.3d 370, 391 (D.C. Cir. 2007), *aff’d sub nom.* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

### III. *Heller* and *McDonald* Establish an Individual Right to Keep and Bear Arms in the Home for Self-Defense

Like the District of Columbia Circuit below, the Supreme Court adopted the individual right approach when it struck down the District of Columbia gun regulation in *Heller*.<sup>48</sup> In the Court's words, the law "totally ban[ned] handgun possession. . . [and] amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]," which is an "inherent right. . . central to the Second Amendment . . ."<sup>49</sup> To be sure, the law was one of the most restrictive gun control measures in the country.<sup>50</sup> It banned possession of handguns and required all other firearms to be kept in the home where they had to be trigger-locked or disassembled.<sup>51</sup> The Supreme Court, after conducting a lengthy inquiry into the construction of the text of the Second Amendment and its historical context, concluded that it "conferred an individual right to keep and bear arms," and this right extends to all Americans, not just members of a militia.<sup>52</sup> Therefore, the Court held, all citizens must be able to keep and use firearms "for the core lawful purpose of self-defense."<sup>53</sup> Because the home is "where the need for defense of self, family, and property is most acute," the District of Columbia's "absolute prohibition of handguns held and used for self-defense in the home" was unconstitutional.<sup>54</sup> With this holding, the Supreme Court explicitly endorsed the individual right view of the Second Amendment.

Though it announced a seemingly broad proclamation of law, the Court was careful to clarify that the holding in *Heller* did not invalidate the numerous gun control laws already in place.<sup>55</sup> The Second Amendment, the Court emphasized, is "not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner

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<sup>48</sup> 554 U.S. at 635.

<sup>49</sup> *Id.* at 626-27.

<sup>50</sup> *Id.* at 629 (commenting that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban").

<sup>51</sup> *Id.* at 635.

<sup>52</sup> *Id.* at 581, 595.

<sup>53</sup> *Id.* at 630.

<sup>54</sup> *Heller* at 628.

<sup>55</sup> *Id.* at 626.



whatsoever and for whatever purpose.”<sup>56</sup> The Court provided a list of various gun control regulations— referred to by some constitutional law scholars as the “*Heller* safe harbor”— that do not infringe on the Second Amendment right to bear arms.<sup>57</sup> Taking a historical approach, the Court noted that most nineteenth century courts held concealed carry laws valid under both the Second Amendment and state constitutions.<sup>58</sup> Those holdings would not be called into question because of the Court’s decision in *Heller*.<sup>59</sup> Similarly, the “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms” were all presumptively lawful under the Second Amendment.<sup>60</sup> The Court further qualified this list of exceptions by asserting that it was merely providing “examples” of permissible regulations, and the list was not meant to be “exhaustive.”<sup>61</sup>

Two years later in *McDonald*, the Supreme Court reaffirmed its holding that the Second Amendment guarantees the individual’s right to keep and bear arms in the home for self-defense, and it further extended this right by applying it to the states by virtue of the Due Process Clause of the Fourteenth Amendment.<sup>62</sup> In *McDonald*, plaintiffs challenged a Chicago municipal law that banned individuals from possessing firearms unless they had a valid registration certificate.<sup>63</sup> The law also prohibited the registration of most handguns, and so it effectively banned handguns in the city.<sup>64</sup> In addition, the plaintiffs challenged an Oak Park, Illinois, ban that held it “unlawful for any person to possess . . . any firearm.”<sup>65</sup> The Supreme

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<sup>56</sup> *Id.*

<sup>57</sup> Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1248 (2009) (internal quotation marks omitted).

<sup>58</sup> *Heller*, 554 U.S. at 626.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 626-27.

<sup>61</sup> *Id.* at 627 n.26.

<sup>62</sup> 130 S. Ct. at 3026.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (citing Chicago, Ill. Municipal Code § 8-20-050(c)).

<sup>65</sup> *Id.* (quoting Oak Park, Ill. Municipal Code § 27-2-1 (2007); 27-1-1 (2009)) (internal quotation marks omitted).

Court struck down both of these laws as violative of the Second Amendment.<sup>66</sup> The individual right to keep and bear arms, the Court reasoned, is “deeply rooted in this Nation’s history and traditions,” and is one that the Founding Fathers deemed important enough to warrant constitutional protection.<sup>67</sup> As a result, a plurality of the Court held that the Second Amendment right is a “fundamental” one, and, as such, the Amendment should be incorporated under the Fourteenth Amendment Due Process Clause and made applicable to the states.<sup>68</sup>

However, the *McDonald* plurality, like the *Heller* majority, found that the Second Amendment is not unlimited, and its decision did not “cast doubt” on the constitutionality of the “longstanding regulatory measures” highlighted in *Heller*.<sup>69</sup> Moreover, the plurality made clear that making the Second Amendment applicable to the states “[did] not imperil every law regulating firearms.”<sup>70</sup> Instead, according to the plurality, state and local experimentation with “reasonable firearms regulations” should continue.<sup>71</sup> Like *Heller*, the *McDonald* decision focused on the right of handgun possession in the home. The *McDonald* Court noted that self-defense is “the central component of the Second Amendment right,” and it stressed that the need to exercise that right is “most acute” in the home in order to protect “self, family, and property.”<sup>72</sup> Therefore, in the Court’s view, the Second Amendment afforded every citizen the ability to keep and bear arms in order to preserve his own self-defense.<sup>73</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 3036-37 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

<sup>68</sup> *McDonald*, 130 S. Ct. at 3050 (plurality opinion). Though a majority of the Supreme Court agreed that the Second Amendment applied to the states, the Court could not agree on which provision of the Fourteenth Amendment incorporated it. Justice Alito, writing for the plurality, held that the Due Process Clause incorporated the Second Amendment. *Id.* Justice Thomas, concurring in the judgment, held that the Fourteenth Amendment’s Privileges or Immunities Clause made the Second Amendment applicable to the states. *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

<sup>69</sup> *Id.* at 3047.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 3046 (internal citations omitted).

<sup>72</sup> *McDonald*, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S. at 628).

<sup>73</sup> *Id.* at 3050.

Perhaps just as important as what the Supreme Court said in *Heller* and *McDonald* is what it did *not* say. Although the Court finally adopted the individual right approach to the Second Amendment when it affirmed the individual's right to keep and bear arms in the home for self-defense purposes, it did little more than that.<sup>74</sup> Neither *Heller* nor *McDonald* endorsed a standard of review that lower courts should use in evaluating gun control legislation.<sup>75</sup> In the *Heller* majority opinion, Justice Scalia said only what level of scrutiny would not apply: rational basis review.<sup>76</sup> Such a lenient standard, Justice Scalia noted, would be wholly inappropriate for a "specific, enumerated right" like the right to bear arms.<sup>77</sup> Justice Scalia similarly rejected an "interest balancing" approach as inappropriate. Justice Breyer advocated such an approach in his dissent, which would require the Court to weigh the individual's right to bear arms against the state's interest in promoting public safety.<sup>78</sup> Instead, Justice Scalia simply stated that future challenges to gun control legislation would determine the scope of the Second Amendment and the standard of review that ought to apply.<sup>79</sup> Similarly, in *McDonald*, the plurality rejected Justice Breyer's "interest balancing" approach, but did not identify which standard of review ought to be used.<sup>80</sup> It said only that "reasonable" gun control legislation would be permissible.<sup>81</sup>

Nevertheless, the impact of *Heller* and *McDonald* should not be underestimated. These cases have spawned an overwhelming number of Second Amendment lawsuits and legal claims since the Supreme

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<sup>74</sup> See *id.* (plurality opinion) (rejecting an interest-balancing approach advocated by Justice Breyer in his dissent in *Heller*, but declining to propose an alternative standard for reviewing gun control regulations); see also *Heller*, 554 U.S. at 634-36 (recognizing the dissent's criticism that the majority did not settle on a standard of review for gun control regulations, but concluding that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.").

<sup>75</sup> *Heller*, 554 U.S. at 634-35.

<sup>76</sup> *Id.* at 688 (Breyer, J., dissenting).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 689-90 (Breyer, J., dissenting); *id.* at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

<sup>79</sup> *Id.* at 635.

<sup>80</sup> *Id.*

<sup>81</sup> *McDonald*, 130 S. Ct. at 3046.

Court handed them down, and the constitutionality of gun control laws remains far from clear without a Supreme Court-endorsed standard of review.<sup>82</sup>

#### IV. JUDICIAL REVIEW OF GUN CONTROL LEGISLATION POST-*HELLER* AND *MCDONALD*

As noted above, gun advocates have initiated hundreds of lawsuits since *Heller* and *McDonald*, and lower courts have yet to settle on which standard of review is proper in reviewing Second Amendment challenges.<sup>83</sup> Most courts have applied intermediate scrutiny.<sup>84</sup> Other courts, however, have used strict scrutiny, a reasonableness standard, or even a hybrid of strict and intermediate scrutiny.<sup>85</sup> While the review of gun control legislation has been inconsistent, the result has been the same: challenged gun control laws have almost always survived constitutional scrutiny, regardless of the test applied.<sup>86</sup>

##### A. Gun Control Legislation in the *Heller* “Safe Harbor”

The Supreme Court in *Heller* made clear that its decision did not call into question “longstanding prohibitions” on gun possession, such as those on the possession of firearms by felons and the mentally ill, laws banning guns in sensitive places such as schools and government buildings, and laws imposing conditions and qualifications on the commercial sale of firearms.<sup>87</sup> *Heller* also explicitly approved of the “historical tradition of prohibiting the

<sup>82</sup> Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1199-1200 (2009).

<sup>83</sup> See *United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (noting that “*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations”).

<sup>84</sup> See, e.g., *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1317 (M.D. Ga. 2011) (“This Court joins the majority of other courts and concludes that intermediate scrutiny is the appropriate standard of scrutiny for this case.”); see also *Heller v. District of Columbia* (“*Heller II*”), 698 F. Supp. 2d 179, 186 (D.D.C. 2010).

<sup>85</sup> Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, Am. Constitution Soc’y 2-7 (Oct. 2010), <http://www.acslaw.org/files/Mehr%20and%20Winkler%20Standardless%20Second%20Amendment.pdf>.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> *Heller*, 554 U.S. at 626-27.

carrying of dangerous and unusual weapons.”<sup>88</sup> As a result of this language, lower court judges have easily dismissed challenges to the gun control laws that fit into this list of *Heller*-endorsed exceptions, sometimes “with gusto.”<sup>89</sup> For instance, a number of federal courts have upheld felon-in-possession bans in the wake of *Heller*.<sup>90</sup> As one court that considered a challenge to the ban noted, “[t]here is no wiggle room to distinguish the present case from the Supreme Court’s blanket [presumptively lawful] statement.”<sup>91</sup> Similarly, bans on gun possession by the mentally ill have survived Second Amendment challenges.<sup>92</sup> Courts have similarly upheld bans on assault weapons, citing the *Heller* Court’s approval of the tradition of prohibiting dangerous and unusual weapons.<sup>93</sup> So too have lower courts rejected challenges to the Gun Free School Zone Act (“GFSZA”) and bans on possession of firearms at post offices because of the Court’s explicit endorsement of bans of firearms in “sensitive places.”<sup>94</sup> Most recently, lower courts have expanded this “sensitive place” category beyond schools and government buildings to include county property, national parks, and airports.<sup>95</sup>

<sup>88</sup> *Id.* at 627 (internal quotation marks omitted).

<sup>89</sup> Denning & Reynolds, *supra* note 57, at 1248.

<sup>90</sup> See, e.g., *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir.), *cert. denied*, 129 S. Ct. 2814 (2009); *United States v. Brunson*, 292 F. App’x 259, 261 (4th Cir. 2008) (per curiam) (unpublished); *United States v. Miller*, 604 F. Supp. 2d 1162, 1168 (W.D. Tenn. 2009).

<sup>91</sup> *United States v. Schultz*, No. 10:08-CR-75-TS, 2009 WL 35225, at \*5 (N.D. Ind. Jan. 5, 2009).

<sup>92</sup> See, e.g., *United States v. McRobie*, No. 08-4632, 2009 WL 82715, at \*1 (4th Cir. Jan. 14, 2009) (per curiam) (rejecting a challenge to 18 U.S.C. § 922(g)(4), which bans possession of firearms by individuals who have been committed to a mental institution).

<sup>93</sup> See *Heller II*, 698 F. Supp. 2d at 194-95 (holding that the District of Columbia’s firearms registration process, prohibition of assault weapons, and prohibition of large capacity ammunition feeding devices was constitutional following the majority’s opinion in *Heller*).

<sup>94</sup> 18 U.S.C. § 922(q)(2)(A) (2006); Denning & Reynolds, *supra* note 57, at 1252 (citing *United States v. Lewis*, No. 2008-45, 2008 WL 5412013, at \*2 (D.V.I. Dec. 24, 2008) (rejecting a challenge to the GFSZA); *United States v. Dorosan*, No. 08-042, 2008 WL 2622996, at \*6 (E.D. La. June 30, 2008) (order denying a defendant’s challenge to Postal Regulation 39 C.F.R. §232.1, banning weapons on U.S. Postal Service property)).

<sup>95</sup> *Nordyke v. King*, 563 F.3d 439, 459-60 (9th Cir. 2009) (finding that county property is a “sensitive place”); *United States v. Masciandaro*, 638 F.3d at 460 (including national parks in the “sensitive place” category); *New York v. Ferguson*,

Lower courts have also upheld gun control measures not specifically mentioned in *Heller*, relying on a footnote in Justice Scalia's majority opinion that cautioned that his list of "presumptively lawful regulatory gun measures" was not meant to be "exhaustive," but merely to provide examples of the types of laws that do not pose a challenge to the Second Amendment.<sup>96</sup> Courts have therefore upheld bans on gun possession by illegal drug users because such bans are the functional equivalent of felon-in-possession bans, which were explicitly mentioned in *Heller* as permissible.<sup>97</sup> Other courts have found bans on possession by domestic violence misdemeanants constitutional, reasoning that these individuals are analogous to felons, and so such bans are in line with the examples of "presumptively lawful" regulations in *Heller*.<sup>98</sup>

*B. Lower Courts Search for the Proper Standard of Review for Gun Control Legislation*

The line of above cases indicates that lower courts have overwhelmingly upheld gun control legislation. However, they have done so by employing different standards of review.<sup>99</sup> Some courts have adopted strict scrutiny.<sup>100</sup> Several other courts have applied a less conventional hybrid of strict and intermediate scrutiny review or a

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No. 2008QN036911, 2008 WL 4694552, at \*4 (N.Y. Crim. Ct. Oct. 24, 2008) (finding airports to be included as a "sensitive place").

<sup>96</sup> Mehr & Winkler, *supra* note 85, at 2 ("To determine what categories of gun laws are constitutionally permissible, courts usually look to the public safety exceptions listed out in *Heller* and repeated in *McDonald*. In approximately 80% of the more than 200 post-*Heller* cases, the courts upheld gun control by arguing that the challenged law was among those public safety exceptions or was sufficiently similar.").

<sup>97</sup> See, e.g., *United States v. Yancey*, 621 F.3d 681, 684 (7th Cir. 2010) (per curiam) (holding that 18 U.S.C. § 922(g)(3), which prohibits unlawful drug users from possessing guns, is constitutional); *United States v. Seay*, 620 F.3d 919, 920 (8th Cir.) (same), *cert. denied*, 131 S. Ct. 1027 (2010).

<sup>98</sup> See, e.g., *United States v. Booker*, 570 F. Supp. 2d 161, 164-65 (D. Me. 2008) (holding that because domestic violence misdemeanants have been convicted of violent crimes, they ought to be "added to the list of 'felons and the mentally ill' against whom the 'longstanding prohibitions on the possession of firearms' survive Second Amendment scrutiny" (quoting *Heller*, 554 U.S. at 626)).

<sup>99</sup> Mehr & Winkler, *supra* note 85, at 1.

<sup>100</sup> See, e.g., *Booker*, 570 F. Supp. 2d at 163.

“reasonableness” test.<sup>101</sup> Nevertheless, the majority of courts have used intermediate scrutiny in evaluating gun control regulations.<sup>102</sup>

As noted above, a few courts have adopted strict scrutiny to review gun control regulations.<sup>103</sup> Significantly, these courts have upheld gun control legislation in every instance, even under this stringent standard.<sup>104</sup> For example, a federal district court faced with a challenge to a statute banning domestic violence misdemeanants from possessing guns employed strict scrutiny because “the *Heller* Court described the right to keep and bear arms as a fundamental right,” and “where fundamental rights are at stake, strict scrutiny is to be applied.”<sup>105</sup> However, when it applied strict scrutiny, the court found a compelling government interest in protecting domestic partners and children from gun violence.<sup>106</sup> Further, the ban was narrowly tailored to serve this interest because it covered only those individuals who had been “convicted of using or attempting to use physical force or threatening to use deadly force against present and past domestic partners and children” and because “various safeguards are established to ensure due process.”<sup>107</sup>

A smaller number of courts have offered a hybrid of strict and intermediate scrutiny as the proper approach.<sup>108</sup> These courts generally hold that with regulations that “severely burden the core Second Amendment right of armed defense” in the home, strict scrutiny is proper.<sup>109</sup> But, for laws that do not burden this core right, intermediate scrutiny ought to be applied.<sup>110</sup> The Fourth Circuit adopted this approach in *United States v. Chester* to uphold a ban on possession by domestic violence misdemeanants, reasoning that

<sup>101</sup> Mehr & Winkler, *supra* note 85, at 5-6.

<sup>102</sup> See, e.g., *GeorgiaCarry.Org*, 764 F. Supp. 2d at 1317 (upholding a Georgia ban on possession of weapons in places of worship and stating that “[t]his Court joins the majority of other courts and concludes that intermediate scrutiny is the appropriate standard of scrutiny for this case”).

<sup>103</sup> See, e.g., *Booker*, 570 F. Supp. 2d at 163-64; *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009).

<sup>104</sup> *Booker*, 570 F. Supp. 2d at 164; *Engstrum*, 609 F. Supp. 2d at 1231.

<sup>105</sup> *Engstrum*, 609 F. Supp. 2d at 1231-32.

<sup>106</sup> *Id.* at 1233.

<sup>107</sup> *Id.* at 1235.

<sup>108</sup> Mehr & Winkler, *supra* note 85, at 5-6.

<sup>109</sup> *Id.* at 5-6.

<sup>110</sup> *Id.* at 6.

because these individuals are not “law-abiding citizens,” they are not included in the protection of the “core right” in *Heller* and so intermediate, not strict, scrutiny ought to be applied.<sup>111</sup>

Still other courts have used a “reasonable regulation” standard to analyze gun control laws after *Heller*.<sup>112</sup> These courts ask whether a law “effectively destroys or nullifies the ability of law-abiding people to possess a firearm for self-defense. If so, the law is unconstitutional; if not, the law is deemed to be only a regulation, not a prohibition.”<sup>113</sup> Traditionally, state courts employed this standard, and some have continued to do so post-*Heller*.<sup>114</sup> For instance, the Supreme Court of North Carolina upheld the state’s felon-in-possession ban, holding that it was both reasonable and “fairly related to the public peace and safety.”<sup>115</sup> However, at least one federal judge noted that because this standard is so deferential to legislatures, it could not be the standard intended by the *Heller* Court.<sup>116</sup> A reasonableness test, according to that judge, “would subject the contested provisions to a more lenient measure of scrutiny than that envisioned by the *Heller* [C]ourt,” and thus could not be applied post-*Heller*.<sup>117</sup>

Instead, the majority of lower courts have employed intermediate scrutiny in evaluating challenges to gun control legislation, ruling out both rational basis review and strict scrutiny review.<sup>118</sup> Strict scrutiny is improper, these courts reason, because the list of presumptively lawful regulations outlined in *Heller* is not consistent with strict scrutiny review.<sup>119</sup> The District Court for the

<sup>111</sup> *Chester*, 628 F.3d at 683.

<sup>112</sup> Mehr & Winkler, *supra* note 85, at 6-7.

<sup>113</sup> *Id.* at 6.

<sup>114</sup> *Id.*

<sup>115</sup> *Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2007), *cert. denied*, 130 S. Ct. 3428, *aff’d* 700 S.E.2d 215 (N.C. 2010).

<sup>116</sup> *Heller II*, 698 F. Supp. 2d at 186.

<sup>117</sup> *Id.* (upholding a firearms registration scheme, a ban on assault weapons, and a ban on large capacity ammunition feeding devices under intermediate scrutiny).

<sup>118</sup> See *GeorgiaCarry.Org*, 764 F. Supp. 2d at 1317 (upholding a Georgia ban on possession of weapons in places of worship and stating that “[t]his Court joins the majority of other courts and concludes that intermediate scrutiny is the appropriate standard of scrutiny for this case”).

<sup>119</sup> See, e.g., *Heller II*, 698 F. Supp. 2d at 187; see also *GeorgiaCarry.Org*, 764 F. Supp. 2d at 1317 (“[T]he Supreme Court’s description of a list of presumptively valid regulatory measures is at least implicitly inconsistent with strict scrutiny”); United



District of Columbia, for example, stated that strict scrutiny “would not square” with *Heller*’s list of “presumptively lawful regulatory measures.”<sup>120</sup> Using this logic, the court in that case upheld the city’s firearms registration scheme.<sup>121</sup> At the same time, these courts have also found rational basis review is improper because it is too lenient a standard for a right that a plurality of the Supreme Court has deemed a “fundamental” one.<sup>122</sup> As one court noted, *Heller* instructed lower courts that “some form of heightened scrutiny is necessary in light of the fact that the right at issue is a specific, constitutionally enumerated right.”<sup>123</sup> Following this directive, the Fourth Circuit held that intermediate scrutiny struck the proper balance between the individual’s and the government’s interests, and using that standard of review it upheld a ban on possession of firearms in national parks.<sup>124</sup> A large number of other courts have followed this line of reasoning, settling on intermediate scrutiny to evaluate gun control laws.<sup>125</sup>

### C. One-Gun-Per-Month Laws Pose a Unique Challenge to Courts

One-gun-per-month laws pose a significant challenge to lower courts attempting to analyze them under *Heller* and *McDonald* because these laws place a substantial restriction on the individual’s ability to exercise his right to bear arms, namely by limiting the frequency with which he may lawfully purchase handguns. At the same time, more legislatures are enacting such laws as a response to increased gun-related violence across the country. The first state to enact a law restricting the legal purchase of a handgun to one every thirty days

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States v. Marzzarella, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) (opining that “the [Heller] Court’s willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review” and adopting intermediate scrutiny in reviewing the constitutionality of a ban on purchasing guns with obliterated serial numbers).

<sup>120</sup> *Heller II*, 698 F. Supp. 2d at 187.

<sup>121</sup> *Id.* at 191.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 186.

<sup>124</sup> *Id.*

<sup>125</sup> *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1116 (S.D. Cal. 2010) (noting that “a majority of cases citing to *McDonald* and employing some form of heightened scrutiny. . . have employed intermediate scrutiny”).

was South Carolina in 1976 (and which later repealed it in 2004).<sup>126</sup> Since then, four other states have passed similar laws: Virginia in 1993, Maryland in 1996, California in 2000, and New Jersey in 2010.<sup>127</sup> Recently, in 2013, Massachusetts Governor Deval Patrick reintroduced a one-gun-per-month bill for the legislature to consider that originally failed to pass in 2010.<sup>128</sup> The bill is one of the most comprehensive yet, requiring a thirty-day waiting period for handguns, rifles, shotguns, firearms, machine guns, large capacity weapons, and large capacity feeding device purchases.<sup>129</sup>

As noted in the Introduction, state legislatures have enacted one-gun-per-month laws to prevent the flow of guns from states with weaker firearms regulations to states with stricter firearms regulations.<sup>130</sup> That is, the law seeks to target “straw” purchasers who buy guns in bulk and then resell them illegally to individuals who otherwise could not purchase a gun legally under state law, such as criminals and minors. Opponents of one-gun-per-month laws, however, argue that they infringe on individuals’ Second Amendment right to bear arms by arbitrarily restricting the number of guns that they may purchase, by means that are otherwise legal, in a thirty-day period.<sup>131</sup> Just last year, the Virginia state legislature, one of the early champions on the law, voted to repeal its one-gun-per-month law.<sup>132</sup> Although one-gun-per-month laws have not been challenged in court, the constitutionality of these laws is an issue that is ripe for review in the wake of *Heller* and *McDonald*, and one that is likely to be raised in the coming years by litigants who ascribe broad

<sup>126</sup> Act of May 19, 2004, 2004 S.C. Sess. Laws Act 242 (2004).

<sup>127</sup> VA. CODE ANN. § 18.2-308.2:2(P) (West 2009); 2012 Va. Acts ch. 37; MD. CODE ANN., PUB. SAFETY § 5-128(b) (LexisNexis 2011); CAL. PENAL CODE §§ 26835(f), 27535(a) (West 2012); N.J. STAT. ANN. §§ 2C:58-2, 2C:58-3 (West 2011).

<sup>128</sup> H.B. 4102 § 6, 186th Gen. Court, 1st Ann. Sess. (Mass. 2009), *available at* <http://www.mass.gov/legis/bills/house/186/ht04pdf/ht04102.pdf>.

<sup>129</sup> Scott Malone, *Massachusetts governor offers new gun laws after Newtown*, REUTERS, Jan. 16, 2013, <http://www.reuters.com/article/2013/01/16/us-usa-guns-massachusetts-idUSBRE90F13L20130116>.

<sup>130</sup> *Multiple Purchase & Sale of Firearms Policy Summary*, *supra* note 11.

<sup>131</sup> See, e.g., Laura Vozzella, *McDonnell signs bill lifting one-handgun-per-month limit*, THE WASHINGTON POST, February 28, 2012, [http://www.washingtonpost.com/blogs/virginia-politics/post/mcdonnell-signs-bill-lifting-one-handgun-per-month-limit/2012/02/28/gIQAAt0kgR\\_blog.html](http://www.washingtonpost.com/blogs/virginia-politics/post/mcdonnell-signs-bill-lifting-one-handgun-per-month-limit/2012/02/28/gIQAAt0kgR_blog.html).

<sup>132</sup> *Id.*

meaning to the Supreme Court's recent decisions.

## V. ANALYSIS

Gun right advocates championed *Heller* and *McDonald* as landmark decisions that firmly entrenched the individual's right to keep and bear arms in American jurisprudence. However, the effect of these decisions on gun control laws has been far more subdued. Lower courts have been wary to read *Heller* and *McDonald* broadly, and they have declined to invalidate much existing gun control legislation. Instead, judges have cited to *Heller*'s list of "presumptively lawful" regulations and upheld gun control laws without much difficulty.<sup>133</sup> Nevertheless, as courts are faced with more and more challenges to gun control laws that fall outside of *Heller*'s safe harbor, they will be forced to resolve the difficult question of which constitutional standard of review to apply to these laws.

This Part will first show that intermediate scrutiny is the proper standard of review for gun control laws that do not infringe on the "core right" of the individual to keep and bear arms, as recognized in *Heller* and *McDonald*.<sup>134</sup> Intermediate scrutiny provides the flexibility and ability for local experimentation that the Supreme Court envisioned for such laws, but it also acknowledges that mere rational basis review is insufficient for a specific, enumerated right. Then, this Part will evaluate one-gun-per-month laws under intermediate scrutiny and determine that these laws pass constitutional muster under this heightened standard of review.<sup>135</sup>

### A. *Intermediate Scrutiny is the Proper Standard of Review for Gun Control Legislation*

Rational basis review or a "reasonableness" test is too lenient a standard to apply to restrictions that impinge on a right that the Supreme Court recognizes not only to be a "specific, enumerated right," but a "fundamental" one.<sup>136</sup> Justice Scalia explicitly ruled out the rational basis approach to Second Amendment cases in the *Heller* majority opinion: "[o]bviously, the [rational basis] test could not be

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<sup>133</sup> See discussion *supra* Part II.

<sup>134</sup> See *infra* Part IV.A.

<sup>135</sup> See *infra* Part IV.B.

<sup>136</sup> *Heller*, 554 U.S. at 628 n.27; *McDonald*, 130 S. Ct. at 3050 (plurality opinion).

used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”<sup>137</sup> The reasonableness test, which inquires only whether the law is “a reasonable method of regulating the right to bear arms,” has been called the functional equivalent of the rational basis standard.<sup>138</sup> As such, neither standard provides the heightened standard of scrutiny that *Heller* appears to require. As one federal judge noted, it is doubtful that the *Heller* majority “envisioned [such a lenient standard] when it left for another day a determination of the level of scrutiny to be applied to firearms laws.”<sup>139</sup>

Strict scrutiny is also an inadequate standard for evaluating Second Amendment challenges. It is true that in *Heller* and *McDonald*, the Supreme Court did not explicitly rule out strict scrutiny as the proper standard of review like it did rational basis review.<sup>140</sup> However, the Court seems to have implicitly ruled out the application of strict scrutiny to these laws for a number of reasons. For one, the “presumptively lawful” gun control regulations in the *Heller* safe harbor would likely be found unconstitutional if a court were to apply strict scrutiny, which requires not only that the law in question serves a “compelling government interest,” but also that the law is “narrowly tailored” to that interest.<sup>141</sup> These regulations undoubtedly seek to preserve public safety, an interest that the Supreme Court has found “compelling.”<sup>142</sup> However, a court would likely find that they do not

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<sup>137</sup> *McDonald*, 130 S. Ct. at 3050 (plurality opinion).

<sup>138</sup> *Heller II*, 698 F. Supp. 2d at 187.

<sup>139</sup> *Id.*

<sup>140</sup> See discussion *infra* Part II.

<sup>141</sup> *Heller*, 554 U.S. at 688 (Breyer, J., dissenting) (stating that under strict scrutiny, the constitutionality of *Heller*’s presumptively lawful regulations “would be far from clear”); *Marzzarella*, 595 F. Supp. 2d at 604 (noting that “the Court’s willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of strict scrutiny standard of review”); Henigan, *supra* note 82, at 1197-98 (2009) (opining that “the *Heller* majority . . . implicitly rejected strict scrutiny” when it described gun control regulations that are presumptively lawful).

<sup>142</sup> See *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (stating that “the Government’s general interest in preventing crime is compelling” and may outweigh “the individual’s strong interest in liberty”).

satisfy the narrow tailoring requirement of the strict scrutiny test. For instance, at least one federal judge noted that felon-in-possession bans are “wildly overinclusive” because they include both violent and non-violent felons.<sup>143</sup> Yet, felon-in-possession bans are a category of regulations that *Heller* explicitly named to be presumptively lawful.<sup>144</sup>

It is also important to note that in both *Heller* and *McDonald*, the Supreme Court indicated not only that its holdings were not meant to disturb longstanding gun control regulations, but that it did not wish to hinder the ability of lawmakers to create other reasonable regulations.<sup>145</sup> In the past, the Supreme Court has described strict scrutiny as “strict in theory, but fatal in fact” to laws analyzed under the standard.<sup>146</sup> This would suggest that the Supreme Court meant for gun control regulations to be scrutinized under a more flexible standard of review in order to keep with its statement that its holdings in *Heller* and *McDonald* “[do] not imperil every law regulating firearms.”<sup>147</sup> Indeed, the Fourth Circuit noted, “[w]ere we to require strict scrutiny in circumstances such as those presented here [a challenge to a law banning possession of loaded guns in cars in national parks], we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers’ ability to ‘prevent [ ] armed mayhem’ in public places and depriving them of ‘a variety of tools for combating that problem.’”<sup>148</sup> In these circumstances, intermediate scrutiny provides a better fit.

Lastly, the Court in *Heller* determined that the right to bear arms is an “enumerated right,” and most other “enumerated” rights are not analyzed under strict scrutiny.<sup>149</sup> As Professor Adam Winkler notes, “strict scrutiny is quite rarely applied to laws burdening the textually guaranteed rights found in the Bill of Rights.”<sup>150</sup> It matters not that the *McDonald* plurality referred to the Second Amendment as a “fundamental” right when it was incorporated, for although “all

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<sup>143</sup> *Yancey*, 621 F.3d at 685.

<sup>144</sup> See discussion *infra* Part II.

<sup>145</sup> *Heller*, 554 U.S. at 626-27; *McDonald*, 130 S. Ct. at 3047.

<sup>146</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

<sup>147</sup> *McDonald*, 130 S. Ct. at 3047 (plurality opinion).

<sup>148</sup> *Masciandaro*, 638 F.3d at 471 (citations omitted).

<sup>149</sup> Winkler, *supra* note 22, at 696.

<sup>150</sup> *Id.*

incorporated rights may be fundamental . . . not all incorporated rights trigger strict scrutiny . . . Strict scrutiny is only used in doctrines of two incorporated provisions of the Bill of Rights: the First and Fifth Amendments.”<sup>151</sup> Strict scrutiny is not employed, for example, when analyzing claims under the Fourth Amendment prohibition of unreasonable searches and seizures or the Sixth Amendment right to counsel.<sup>152</sup> In addition, the Second Amendment lacks the absolute language found in the First Amendment, which does employ strict scrutiny in certain circumstances: “Congress shall make no law . . .”<sup>153</sup> Instead, the Court in *Heller* made clear that the right to bear arms “is not unlimited,” and it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose.”<sup>154</sup> Thus, it seems unlikely that the Second Amendment requires strict scrutiny analysis where there is no “strict” language like that found in the First Amendment.

In sum, intermediate scrutiny provides the heightened level of review for such a fundamental right, as required by *Heller*, but it is not so restrictive as to invalidate those “presumptively lawful” regulations that *Heller* expressly endorses. These presumptively lawful regulations would likely survive intermediate scrutiny. Promoting public safety is undoubtedly an important government interest (indeed, as noted above, the Supreme Court has found it to be a “compelling” interest), and courts will likely find regulations similar to those in the *Heller* safe harbor to be “substantially related” to the efforts to protect safety and reduce gun-related violence.<sup>155</sup>

*B. Applying Intermediate Scrutiny, One-Gun-Per-Month Laws  
Pass Constitutional Muster*

State legislatures have enacted one-gun-per-month laws to

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<sup>151</sup> Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 233 (2006).

<sup>152</sup> *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-52 (1995); *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>153</sup> U.S. CONST. amend. I.

<sup>154</sup> *Heller*, 554 U.S. at 626.

<sup>155</sup> *Heller II*, 698 F. Supp. 2d at 191 (noting that under intermediate scrutiny, “the degree of fit between [the gun control regulation] in this case and the well-established goal of promoting public safety need not be perfect; it must only be substantial.”).

reduce the number of guns that enter the illegal firearms market and, more generally, to restrict the flow of interstate firearms trafficking.<sup>156</sup> Much of the legislation aimed at illegal firearms trafficking has focused on handguns, like one-gun-per-month laws.<sup>157</sup> Illegal firearms trafficking across state lines is a serious problem in the United States, in part because firearms sales are regulated at the state level; there is no federal law that limits the number of handguns that an individual may purchase at one time.<sup>158</sup> States that have weaker firearms laws attract traffickers, who make multiple purchases of guns and then resell them in states with stricter firearms laws.<sup>159</sup> Multiple gun sales are of particular concern, for studies have shown that handguns sold in multiple sales to a single purchaser are the type of weapon most frequently used in the commission of crimes.<sup>160</sup> Furthermore, the federal Bureau of Alcohol, Tobacco and Firearms found in 2000 that 20 percent of all retail handguns recovered in crimes were purchased as part of a multiple sale.<sup>161</sup> Thus, one-gun-per-month laws seek to rectify a real problem that contributes to gun-related violence nationwide.

Following *Heller* and *McDonald*, lower courts are not bound by a particular standard of review to apply to one-gun-per-month laws, though the Supreme Court has made clear that mere rational basis review (and probably a “reasonableness” standard) would be inappropriate for such legislation.<sup>162</sup> In order for one-gun-per-month laws to pass constitutional muster, then, they must, at a minimum, serve an important government interest and be substantially related to achieving that interest. It is unlikely that one-gun-per-month laws, like other presumptively lawful gun control regulations, would survive

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<sup>156</sup> *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State, and Selected Local Gun Laws*, LAW CENTER TO PREVENT GUN VIOLENCE 139 (2008), available at <http://smartgunlaws.org/wp-content/uploads/2008/01/RegGens.entire.report.pdf>.

<sup>157</sup> *Id.*

<sup>158</sup> *Multiple Purchase & Sale of Firearms Policy Summary*, *supra* note 11.

<sup>159</sup> *Id.*

<sup>160</sup> *Statistics on Multiple Sales & Purchase of Firearms*, LAW CENTER TO PREVENT GUN VIOLENCE (2012), [http://smartgunlaws.org/multiple-sales-purchases-of-firearms-statistics/#identifier\\_0\\_6349](http://smartgunlaws.org/multiple-sales-purchases-of-firearms-statistics/#identifier_0_6349).

<sup>161</sup> *Id.*

<sup>162</sup> *Heller*, 554 U.S. at 628 n.27.

strict scrutiny.<sup>163</sup> A court would most likely find, using strict scrutiny analysis, that although these laws seek to serve a compelling government interest (that is, protecting public safety), they fail the “narrow tailoring” requirement.

However, as this Note has indicated, strict scrutiny is not the proper standard to apply to gun control legislation like one-gun-per-month laws. Instead, courts faced with challenges to the constitutionality of one-gun-per-month laws should use intermediate scrutiny analysis. That is, these laws need only serve an important government interest and be substantially related to that interest.<sup>164</sup> There are certainly a number of important government interests associated with limiting the right to bear arms, the most significant of which is the interest in preserving public safety and preventing violence.<sup>165</sup> Studies have shown that gun violence is indeed a major problem in the United States—in 2011, it is estimated that 467,321 Americans were victims of a crime commissioned with a firearm, usually a handgun.<sup>166</sup> One-gun-per-month laws seek to remedy this problem by stemming the illegal flow of handguns into the hands of potential criminals. A court would therefore have little trouble finding that one-gun-per-month laws serve an important government interest.

It is the next step of the inquiry—whether the laws are substantially related to that government interest—that requires a bit more analysis. Research shows that one-gun-per-month laws have been effective where enacted.<sup>167</sup> Though now repealed, Virginia’s one-gun-per-month law provides a useful case study: the state adopted its one-gun-per-month law in 1993 after studies indicated that it was a “primary source” of guns recovered from crime scenes in the

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<sup>163</sup> See *id.* at 688 (Breyer, J., dissenting) (determining that under strict scrutiny, the constitutionality of *Heller*’s “safe harbor” regulations “would be far from clear”).

<sup>164</sup> See, e.g., *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (“To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective.”).

<sup>165</sup> See, e.g., *id.* at 693 (“In this case, the government’s stated objective is to keep firearms out of the hands of violent felons, who the government believes are often those most likely to misuse firearms.”).

<sup>166</sup> *Gun Violence*, NATIONAL INSTITUTE OF JUSTICE (2013), <http://www.nij.gov/topics/crime/gun-violence/>.

<sup>167</sup> *Multiple Purchase & Sale of Firearms Policy Summary*, *supra* note 11.



northeastern United States.<sup>168</sup> After the law was adopted, the number of guns traced to Virginia dealers dropped by 71 percent in New York, 72 percent in Massachusetts, and 66 percent in New Jersey, New York, Connecticut, Rhode Island, and Massachusetts combined.<sup>169</sup> To be sure, such research is not conclusive, but intermediate scrutiny only requires that the law substantially achieve its intended goal, not that it is a perfect fit.

Furthermore, it is important to note that in states with lax gun control regulations, the “substantial” relationship between one-gun-per-month laws and promoting public safety may be clearer than in states with stricter gun control regulations. That is, a North Carolina court could find that one-gun-per-month laws effectively hinder firearms trafficking schemes in the state, whereas a New York court, which already has strict restrictions on the purchase of firearms, may not. Justice Alito, writing for the plurality in *McDonald*, encouraged consideration of “local needs and values” when evaluating state and local gun control laws.<sup>170</sup> Intermediate scrutiny provides courts with the flexibility to consider these local factors when determining whether one-gun-per-month laws are substantially related to the goal of thwarting gun trafficking schemes in a particular jurisdiction.

## VI. CONCLUSION

The Second Amendment states, “a well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>171</sup> Though the language of the Amendment seems clear on its face, these words sparked a hotly contested debate among academics and non-academics alike that remained unresolved for nearly two hundred years. Some argued that the Second Amendment afforded individuals an unrestricted

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<sup>168</sup> Douglas S. Weil & Rebecca Knox, *Evaluating the Impact of Virginia’s One-Gun-A-Month Law*, CENTER TO PREVENT HANDGUN VIOLENCE, reprinted in 141 Congr. Rec. S11201-03, at S11209, available at 1995 WL 458462. Virginia repealed its one-gun-per-month law this past year due in large part to heavy lobbying efforts by the firearms industry and the National Rifle Association.

<sup>169</sup> *Id.*

<sup>170</sup> *McDonald*, 130 S. Ct. at 3046 (plurality opinion) (noting that incorporating the Second Amendment to apply to the states “limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values”).

<sup>171</sup> U.S. CONST. amend. II.

right to keep and bear arms, while others asserted that it merely conferred to the states the right to raise and maintain armies in the face of a tyrannical government. At long last, with the *Heller* and *McDonald* decisions in 2008 and 2010, the Supreme Court took the opportunity to spell out the meaning of the Second Amendment: it protects the right of the *individual* to keep and bear arms in the home for self-defense purposes. Initially, gun rights advocates heralded *Heller* and *McDonald* as landmark decisions. However, it remains unclear how far this individual right extends. The Court cautioned that the Second Amendment is “not unlimited,” and it refused to invalidate “longstanding” and “presumptively lawful” gun control regulations. In the wake of *Heller* and *McDonald*, there have been hundreds of cases brought at the state and federal level to challenge gun control legislation, and there has been little consensus among lower courts on how to analyze these laws because the Supreme Court provided no guidance on the issue.

This Note proposes that intermediate scrutiny should be the standard that courts employ when reviewing gun control laws. Rational basis is too lenient a standard for a right that the Supreme Court has declared is an enumerated, fundamental right. On the other hand, strict scrutiny is inappropriate for a right that the Supreme Court has also said is “not unlimited” and not immune to regulation by federal and state gun control laws. Intermediate scrutiny strikes the proper balance: it provides the heightened level of review that is necessary to protect individuals’ interests in their fundamental right to bear arms, but it also allows the government to serve its own interest in preserving public safety and reducing gun-related violence. Under intermediate scrutiny, many gun control regulations that effectively promote these government interests, such as one-gun-per-month laws, would pass constitutional muster.

In the coming years, lower courts are likely to continue to disagree on what level of scrutiny ought to be applied in Second Amendment cases. Continued litigation will undoubtedly help refine the scope and limits of the Second Amendment right to bear arms. However, until the Supreme Court takes an affirmative position on this important Second Amendment issue, the fate of future gun control regulations in the United States remains unclear.